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Supreme Court, U.S.
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No. 03-624

IN THE

SUPREME COURT OF THE UNITED STATES

ANN S. AZDELL and DONALD B. FISHMAN,

Petitioners,

v.

KAY COLES JAMES, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in confirming the authority of the director of the jurisdictional agency, the Office of Personnel Management ("OPM") to exercise its discretion to grant a "variation" from certain OPM practices involved with the commissioning and appointment of federal administrative law judges.

PARTIES TO THE PROCEEDING

Petitioners have been described in the petition for a writ of certiorari. The respondents filing the instant opposition are Murray M. Meeker, the Estate of F. William Roggeveen, Jay E. Levine, and William S. Colwell. Mr. Roggeveen died while this matter was pending at the Federal Circuit. Each of the named respondents is an attorney, an applicant for appointment as federal administrative law judge and a military service veteran entitled to the application of certain veterans' preference points in the federal employment process. These same respondents were identified as petitioners in the action before the Federal Circuit. The other respondent in this action is Kay Coles James, Director, the Office of Personnel Management.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Office of Personnel Management ("OPM") is the jurisdictional agency charged by statute with developing criteria and conducting competitive examinations for federal administrative law judges ("ALJs"). In 1993, OPM promulgated an examination scoring formula that established a minimum passing score of 70 (based on a range from 0 to 100). In addition, OPM added 10.9 points to each candidate's score so that the lowest weight score was raised to a score of 70. At that point, veterans preference points – a statutory entitlement authorized by the Veterans' Preference Act, 5 U.S.C. §3309 – were added to the scores of eligible veteran-applicants.

In 1996, in response to an investigation by the OPM Inspector General, certain portions of the examination were rescored. Unfortunately, that rescoring caused a sharp escalation of the failure rate. To deal effectively and efficiently with this failure rate, OPM modified the scoring formula so that all applicants who could show the requisite lawyering experience and who completed the rest of the examination were given a base score of 70. Applicants were then given a weighted score based on a range of 0 to 30 points. After the weighted score was added to the 70-point base score, additional veterans' preference points were added for eligible veteran-applicants. Because the 1996 formula differed from the 1993 formula, the Director of OPM granted a "variation" under 5 C.F.R. §5.1. Section 5.1 provides in relevant part:

> The Director, Office of Personnel Management, shall promulgate and enforce regulations necessary

> to carry out the provisions of the Civil Service Act and the Veterans' Preference Act. . . . The Director is authorixed, whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation, to grant a variation from the strict letter of the regulation if such a variation is within the spirit of the regulations and the efficiency of the Government and the integrity of the competitive service are protected and promoted.

In 1997, a class action challenging the OPM actions was filed by nonveteran applicants (the "Azdell class") in the Merit Systems Protection Board ("MSPB" or the "Board"). The Board notified the class members of the pendency of the proceeding although it did not notify the veteran-applicants. The Board's Chief Administrative Law Judge conducted a bifurcated evidentiary hearing on which he first found for the Azdell class on the merits and then fashioned a remedy. The four veteran-applicants (Meeker, Roggeveen, Levine and Colwell), respondents here, intervened before the Board after the proceeding on the merits was concluded. With certain minor adjustments, the full Board affirmed the Chief ALJ's decision. Respondents Meeker, Roggeveen, Levine and Colwell along with OPM filed a petition for judicial review in the United States Court of Appeals for the Federal Circuit.

On February 20, 2003 a three-judge panel of the Circuit reversed the Board and vacated the Board's remedial order. *Meeker v. MSPB,* 319 F.3d 1368 (Fed. Cir. 2003) (hereafter "*Meeker*") (The full text of the opinion is set out in the petition for writ of certiorari). On July 23, 2003, the Circuit denied two petitions for rehearing including a petition for rehearing *en banc.*

On the merits of this case. the Federal Circuit determined with elegant simplicity that the Merit Systems Pro-

tection Board "erred when it asserted jurisdiction to address the claim that the 1996 scoring formula violated the Veterans' Preference Act, because the Board does not have general, free-standing jurisdiction to address claims that an OPM employment practice is not in accordance with law." *Id.* at 1376. In so holding, the Circuit rejected arguments by the Azdell class and the Board to the contrary and concluded that the 1996 scoring formula was properly applied by OPM because the Director of OPM had granted a valid variation. The variation, as the Circuit held, "was broad enough to waive strict compliance with the requirements of 5 C.F.R. Part 300." *Id.*

REASONS FOR DENYING THE PETITION

I.

THE VARIATION GRANTED BY THE DIRECTOR OF OPM IS FULLY CONSISTENT WITH THE LANGUAGE OF 5 C.F.R. §5.1.

Federal administrative agencies have long recognized that there are instances in which the specific terms or the express language of an agency rule must be modified or excepted from in order to avoid doing a greater violence to the fundamental purposes of the regulatory scheme. For example, the Department of Energy grants "exceptions" which constitute the "waiver or modification of the requirements of a regulation, ruling or generally applicable requirement under a specific set of facts." 10 C.F.R. §205.2. The Department of Commerce may grant an "adjustment" or "exception" when "a . . . regulation or official action results in an undue or exceptional hardship . . . or the consequence of following a provision of this regulation or an official action is contrary to the intent of [various statutes]." 15 C.F.R. §700.80.

OPM is permitted, under 5 C.F.R. §5.1 to grant a variation "whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation . . . if such variation is within the spirit of the regulations and the efficiency of the Government and the integrity of the competitive service are protected and promoted." Section 5.1 also sets out a process for issuing the variation that requires the Director to note on the official record (a) the practical difficulty or hardship involved; (b) the permitted practice that will substitute for a regulatory requirement; (c) a statement of circumstances that promote efficiency and preserve integrity; and (d) a statement of limitation of the variation." As the Federal Circuit correctly noted, the Director of OPM issued the variation and complied with the procedural requirements for issuing the variation. 319 F.3d at 1376.

The variation was clearly necessary because of the enormous failure rate generated by the 1993 formula and the other problems and inconsistencies in the ALJ application scheme. Recognizing that a variation may be reviewable for abuse of discretion, the Federal Circuit concluded that there was no such abuse in this case. *Id.* at 1379.

II.

THE FEDERAL CIRCUIT CORRECTLY HELD THAT MSPB DOES NOT HAVE UNFETTERED JURISDICTION TO REVIEW ANY AND ALL OPM DETERMINATIONS.

The Federal Circuit held squarely that the MPSB "does not have general jurisdiction to entertain any statutory challenge to an employment practice. Rather, the Board's jurisdiction [is limited to] challenges based on the three grounds set forth in 5 C.F.R. §300.103." 319 F.3d at 1375. The Director of OPM – having issued a valid variation – removed this entire case from the scope

of § 300.103 because the variation authorized a departure from the strict language of § 300.103.

Petitioners argue that this holding contravenes this Court's decision in *Lackhouse v. MPSB*, 773 F.3d 313 (Fed. Cir. 1985). Petition at 27. First, the Federal Circuit cited and directly addressed *Lackhouse* to conclude that the question presented in that case was essentially which federal agency, OPM or the Internal Revenue Service, was applying and interpreting the so-called "Rule of Three." 319 F.3d at 1375 n.1. Second, *Lackhouse* is further distinguished from the instant case in that there was no relevant variation applicable to the proceeding as there is in the instant case. Contrary to the assertions of the Petitioners, it is the existence of the *variation* that deprives MSPB of jurisdiction here.

III.
THE FEDERAL CIRCUIT PROPERLY DEFERRED TO THE DETERMINATIONS MADE BY OPM, NOT THE CONCLUSIONS REACHED BY MSPB.

Applying, *sub silentio*, the long-settled doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1987), the Federal Circuit properly deferred to the determinations of the jurisdictional agency, OPM, and not to the MSPB. This deference reflects the fact that OPM is the federal administrative agency charged with developing and implementing a program and policies for commissioning federal ALJs. In emphasizing the legitimacy of the Director's variation, the Federal Circuit noted all of the complications and subtleties that go into a proper implementation of these policies. OPM was responding to an urgent, felt need to appoint additional ALJs and was exercising the broad discretion enjoyed by the Director under the authority to issue variations conferred by 5 C.F.R. 5.1. OPM is the

policy-making body to which a reviewing court must defer. The decision by MSPB does not require *Chevron* deference. *See, e.g., Martin v. Occupational Safety & Health Rev. Comm,* 499 U.S. 144 (1991).

The Petitioners repeatedly cite this Court's decision in *United States Postal Service v. Gregory,* 534 U.S. 1 (2001). A close look at *Gregory* shows that the case is inapposite to the issues presented in the instant case. Maria Gregory was not a stellar employee. The Postal Service initiated three disciplinary actions against her, which actions were pending when she incurred a fourth violation that resulted in her termination from Postal Service employment. An ALJ at the MSPB conducted an evidentiary hearing in which the ALJ made an independent evaluation of the first three disciplinary actions.

This Court concluded that the ALJ had the authority to make that independent review and that the Federal Circuit's review of the ALJ's findings was reviewable only under the arbitrary, capricious standard. However, when closely examined, *Gregory* simply confirms an entirely different proposition of federal administrative law. The Board's ALJ was deciding questions of fact, not questions of law. Factual determinations made in the context of an evidentiary proceeding are subject to arbitrary/capricious/substantial evidence review. Applying that standard, a reviewing court is understandably circumscribed in its ability to overturn the findings of fact made by the person who has presided over the taking of the evidence. *See, e.g., Universal Camera Corp. v. NLRB,* 340 U.S. 474, 479 (1951); *Morgan v. United States,* 298 U.S. 468, 479 (1936).

This is not what the Federal Circuit addressed in the instant case. Here, the Federal Circuit reviewed the

authority of the Director of OPM to issue a variation and concluded that such authority was not reviewable by MSPB under the narrow jurisdictional provisions that establish the Board's authority to examine OPM determinations. This is a question of law to which the Federal Circuit owed no deference to the Board. *Chevron* and *Martin* govern the instant action. As such, the Federal Circuit is certainly not bound by the arbitrary/capricious standard set out in *Gregory*. *Meeker* is apples. *Gregory* is oranges.

IV.
THE PETITIONERS CANNOT SHOW THAT THE OPM VARIATION WAS NOT IN ACCORDANCE WITH LAW. THEREFORE, THE BOARD LACKED JURISDICTION TO REVIEW THIS ISSUE.

The Federal Circuit acknowledged that §7701(c)(2) permits the Board to conduct "not in accordance with law" review "but only with respect to agency decisions that are within the Board's jurisdiction." 319 F.3d at 1375. The Circuit then observed that the Board has jurisdiction to conduct "not in accordance with law" review only "with respect to challenges based on the three grounds set forth in 5 C.F.R. §300.103" – *i.e.*, (a) job description, (b) rational relationship, (c) non-merit factor. As the Circuit correctly noted, the granting of the variation by the Director of OPM is not within these three categories. As a result, the Board may not perform a "not in accordance with law" review of the OPM action. The variation is neither a job description, an issue of rational relationship, nor a non-merit factor.

Petitioners cite this Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988) for the totally unsupported proposition that it is the MSPB that makes federal personnel policy. That is not *Fausto*. This Court's

decision in *Fausto* talks about MSPB providing a unifying role in the disposition of federal personnel disciplinary proceedings only in the context of the historical background. Prior to establishing the MSPB, federal personnel actions could be taken to the various federal district courts for adjudication. Decisions by the federal district courts were highly inconsistent and non-uniform. The MSPB could provide both consistency and uniformity.

Moreover, Petitioners choose to disregard the equally compelling pronouncement of this Court in *Fausto*: that the Federal Circuit has "primacy" for judicial review. *Id.* at 449. Much like *Gregory*, *Fausto* is simply inapposite in the instant action.

V.

THE RECORD BELOW IS TOTALLY DEVOID OF ANY EVIDENCE RELATING THE DECISION BELOW TO THE QUALITY OF FEDERAL ADMINISTRATIVE LAW JUDGES.

Petitioners conclude their pleading with a wholly unsupported statement that the decision under review in this Court, if allowed to stand, will "result in the appointment of lesser qualified administrative law judges to adjudicate important federal programs and benefits." First, there is not one iota of support in the record below for this proposition. Each of the applicants for appointment as ALJ went through a substantial screening and evaluative process before any veterans' preference points were added to any individual application. Each was deemed qualified based on OPM's various screening and evaluative techniques. That certain individuals are subsequently elevated on the list of eligibles higher than others because of the application of the statutory veterans' preference

points has absolutely nothing to do with the qualifications or the abilities of the person ultimately appointed to the position.

CONCLUSION

For the reasons stated, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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